STATE OF MICHIGAN

IN THE SUPREME COURT OF MICHIGAN

NATIONAL WINE & SPIRITS, INC.,
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellee,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court Docket No.126121

Court of Appeals Docket No. 243524

Lower Court Case No. 02-13-CZ

12612

INTERVENING DEFENDANT-APPELLEE
MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION'S
BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

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I. Did the Court of Appeals commit reversible error when it affirmed the trial court's grant of summary disposition to defendants on NWS's equal protection challenge to a statute that involves the manner in which the State of Michigan chooses to structure the distribution of intoxicating liquors where that statute is rationally related to a legitimate state interest?

Plaintiffs-Appellants say:	Yes.
Appellees say:	No.
The trial court says:	No.
The Court of Appeals says:	No.

II. Did the Court of Appeals commit reversible error when it affirmed the trial court's grant of summary disposition to defendants on NWS's dormant commerce clause challenge to a statute that addresses how the State of Michigan chooses to structure the distribution of intoxicating liquors pursuant to its Twenty-First Amendment core powers and where there is, in fact, no discrimination?

Plaintiffs-Appellants say:	Yes.
Appellees say:	No.
The trial court says:	No.
The Court of Appeals says:	No.

COUNTER-STATEMENT OF FACTS

MB&WWA adopts the Counter-Statement of Facts set forth in Defendant State of Michigan's Brief in Opposition to the Application for Leave to Appeal.

INTRODUCTION

NWS's challenge to the constitutionality of MCL 436.1205(3) (hereinafter Section 205(3)) on the basis that it violates the Equal Protection clauses of the United States Constitution and the Michigan Constitution and the "dormant" Commerce Clause of the United States Constitution is meritless. The trial court properly granted summary disposition to defendants. The Court of Appeals correctly affirmed.

I. EQUAL PROTECTION.

NWS's Equal Protection claim must fail because legislative classifications (such as the one being challenged here) are entitled to a presumption of constitutionality. And, as long as the Legislature's judgment is supported by a rational basis, the choices made by the Legislature and the distinctions drawn are constitutional and will withstand an Equal Protection challenge. NWS did not meet its heavy burden of showing the legislation is arbitrary and, therefore, irrational.

The statute being challenged must be read in the context of the State's interest in maintaining its long-established three-tier distribution system for alcoholic beverages. Even prior to the passage of Section 205(3), the Michigan Legislature declared that it was Michigan's policy to "maintain a sound, stable and viable 3-tier distribution system of wine to the public."[1] MCL 436.1305(I). Section 205(3) promotes that legislative policy in a rational and legitimate way in light of the privatization of spirits distribution in 1996.[2]

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[1] That statute deals with the relationship between wholesalers and suppliers of wine.

[2] As discussed below, the State wholesaled and distributed spirits (*i.e.*, "hard liquor") prior to privatization of that function in 1996. Many of the retail outlets that sell spirits also sell wine.

Wine wholesalers make up the middle tier of the highly-regulated wine distribution system. And, it is important to recognize that alcohol is a unique product, subject to extra-ordinary regulation by the State. Indeed, alcohol is the only product that is mentioned specifically in both the United States Constitution (Twenty-First Amendment, US Const, Am XXI) and the Michigan Constitution (Mich Const 1963, art IV, § 40). Therefore, legislation in this area must be examined in light of the unique role and interest of the State in this subject matter.

The statute being challenged here does not violate the Equal Protection clauses. Quite the contrary, as recognized by both lower courts the statute is a legitimate endeavor by the Legislature to maintain a viable wine distribution system. In passing Section 205(3), the Legislature recognized that any entity becoming an authorized distribution agent ("ADA") would receive money from the State and/or from suppliers of spirits to warehouse and distribute spirits to pay the operating costs for warehousing and distributing spirits. As a result, such entities would have the ability to gain an unfair economic advantage over previously-established wine wholesalers who built their businesses within the pre-existing, long-standing highly-regulated three-tier system and who serve an important ***State interest*** within the three-tier system.

By law, a wine wholesaler is limited to selling those brands of wine assigned by a supplier of wine and may sell those brands only in a specific geographic territory determined by the wine supplier. *See* MCL 436.1305(2)(a), (2)(h) and (4). By law, a supplier can appoint more than one wine wholesaler to a particular geographic territory.[3]

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[3] This is in contrast to distribution of beer, wine coolers and mixed spirit drinks which are all required by law to be sold in exclusive territories. *See, e.g.,* MCL 436.1401 (requiring exclusive territories to distribute beer and malt beverages). These differences

Therefore, in passing Section 205(3), the ***State*** sought to maintain ***its*** existing wine distribution system by prohibiting a supplier of wine (who often is also a supplier of spirits) from appointing a wholesaler that voluntarily becomes an ADA (or any ADA who voluntarily becomes a wholesaler) to distribute the very same brand of wine as an existing non-ADA wholesaler in geographic areas where that ADA/wholesaler was not already distributing that brand of wine in that geographic territory on or before September 24, 1996, a point in time when the Legislature was considering amendments to what eventually became the privatization law.[4] And, it should be stressed that the legislative restrictions on ADAs/wholesalers do not prohibit NWS from becoming a wholesaler, from purchasing an existing wholesaler, or from wholesaling many brands of wine. Section 205(3) puts restrictions on both ADAs who become wholesalers and wholesalers who become ADAs in order to maintain an orderly market for wine. Section 205(3) reasonably addresses a complex issue in a complex, highly-regulated, unique industry. To say the State's chosen approach is irrational, is frivolous.

II. COMMERCE CLAUSE CHALLENGE.

The trial court and Court of Appeals also properly rejected NWS's Commerce Clause challenge. The lower courts recognized that the challenged statute is facially neutral and does not treat in-state companies differently than out-of-state entities – all are treated alike. And, in fact, NWS cannot claim that Michigan forecloses out-of-state

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show the high degree of regulation in this area and that the State has carefully considered how it wants its alcoholic distribution system to be structured.

[4] NWS's brief is extremely inaccurate when it talks about the restrictions placed on anyone who chooses to become both a wine wholesaler and an ADA. In fact, the legislation is tailored to only limit dualing of **particular** brands in **particular** geographic areas under specific circumstances.

companies from entering the market, since NWS (an out-of-state corporation) became an ADA in 1996 and could have become a wholesaler at any time prior to 1996, just as it did in 1999.

Most importantly, even assuming incorrectly that there were some minor impact on interstate commerce, the statutory scheme at issue here is ***not*** subject to the Commerce Clause because it involves a "core power" (structuring of the distribution system of intoxicating liquors) delegated to the State under the Twenty-First Amendment of the U.S. Constitution and by Congress under the Webb-Kenyon Act.

ARGUMENT

I. THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY FOUND THAT SECTION 205(3) IS RATIONALLY RELATED TO A LEGITIMATE STATE CONCERN, SO THERE IS NO EQUAL PROTECTION VIOLATION.

The Equal Protection clauses of the United States Constitution and the Michigan Constitution are co-extensive. US Const, Am XIV; Mich Const 1963, art 1, § 2. *Wysocki v Felt*, 248 Mich App 346, 350-351 (2001), *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 716 (1997). The appropriate test depends on the type of classification and the nature of the interest affected. Legislation that creates an inherently suspect classification such as race, or that affects a fundamental right, is reviewed according to the "strict scrutiny" test. Other classifications that are suspect, but not inherently suspect, such as gender, are subject to a middle-level "substantial relationship" test. *People v Pitts*, 222 Mich App 260, 272-273 (1997), citing *People v Perlos*, 436 Mich 305, 331 (1990); *Neal v Oakwood Hosp, supra* at 717.

However, the statute at issue here involves social and economic concerns about the only product (alcohol) that is referenced in both the Michigan and U.S. Constitutions.

As even NWS concedes, social or economic legislation is reviewed under the "rational basis" test. *Pitts, supra* at 273; *Neal, supra*; *Wysocki, supra* at 354. Under this test, a statute will be upheld if the classification scheme is rationally related to a legitimate governmental purpose. *People v Pitts, supra* at 273, citing *Doe v Department of Social Serv*, 439 Mich 650, 662 (1992). In *Florentine Ristorante, Inc v City of Grandville*, 88 Mich App 614 (1979), the Court applied the rational basis test and rejected an Equal Protection challenge to an ordinance regulating the sale of beer and wine on Sundays. *See Id.* at 623

("The critical question here is whether [the regulation] . . . is rationally related to a legitimate municipal objective . . .")

Under the rational basis test, the legislation is presumed to be constitutional. The party challenging the statute has the burden of proving the legislation is arbitrary, and thus irrational. *People v Pitts, supra* at 273. State legislatures have a wide range of discretion in establishing classifications in the exercise of their powers to regulate. *Fox v Employment Sec Comm*, 379 Mich 579, 588 (1967) (opinion of T.M. Kavanaugh, J.).

In *Wysocki, supra*, the Michigan Court of Appeals addressed an Equal Protection challenge to MCL 600.2955a, which barred the tort recovery of a plaintiff who was more than 50% at fault as a result of intoxication. The Court summarized the applicable equal protection standard:

> "In Michigan, courts have applied the rational basis test principally to economic and social legislation. Under the traditional or rational basis test, a classification will stand unless it is shown to be 'essentially arbitrary.' Stated differently, one who attacks an enactment must show that it is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.' 'Few statutes have been found so wanting in "rationality" as to fail to satisfy the "essentially arbitrary" test.' Stated positively, the test is that courts must uphold a statutory classification where it is rationally related to a legitimate government purpose. The rational basis test '"reflects the judiciary's awareness that 'it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation."'" 248 Mich App at 354. (Citations omitted.)

Under established rules of statutory construction courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent. *Id.* at 355. The party challenging the constitutionality of an act must establish that no set of circumstances exist under which the act would be valid.

The rational basis test does not measure the wisdom, need or appropriateness of legislation. *People v Pitts, supra* at 273. When a statute is challenged under Equal Protection, a court should consider the provisions of the whole law, as well as its object and policy. A rational basis exists when the legislation is supported by any state of facts either known or that could reasonably be assumed. *Neal v Oakwood Hosp, supra*, 226 Mich App at 719.

Federal courts have established similar principles governing application of the rational basis test. For example, in *Hadix v Johnson*, 230 F3d 840, 843 (CA 6, 2000), the Sixth Circuit stated that a statue will be afforded a strong presumption of validity and must be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate government purpose. The government has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data. *Id.*, quoting *FCC v Beach Communications, Inc*, 508 US 307, 315 (1992). NWS bears the heavy burden of "'negativing every conceivable basis which might support [the legislation], . . . whether or not the basis has a foundation in the record.'" *Id.*, quoting *Heller v Doe*, 509 US 312, 320 (1993).

The rational basis test affords wide latitude to social and economic legislation. "'The Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.'" *Olympic Arms v Magaw*, 91 F Supp 2d 1061, 1071 (ED Mich, 2000), quoting *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 440 (1985).

Rational basis is a deferential review. *Breck v State of Michigan*, 203 F3d 392, 395 (CA 6, 2000). The courts need only find "plausible reasons" for the legislative action.

Olympic Arms, supra at 1072, quoting *FCC v Beach Comm, supra*. Whether the identified legitimate State interests were actually considered in establishing the regulation is irrelevant. Whether the Legislature was "'unwise in not choosing a means more precisely related to its primary purposes is irrelevant.'" *Breck, supra* at 396, quoting *Vance v Bradley*, 440 US 93, 109 (1979). Statutory classifications will be set aside based on Equal Protection only if no grounds can be conceived to justify them. *Olympic Arms, supra* at 1072, quoting *McDonald v Board of Election Comm'rs of Chicago*, 394 US 802, 809 (1969). Whether or not the "ends" proffered by the government in support of the statute are actually those implicitly intended by the Legislature is of little consequence so long as they are plausible. *Olympic Arms, supra* at 1073.

In determining whether legislation has a rational basis, the court does not question the wisdom of the legislation. Nor should the court substitute its conception of sound public policy for that of the Legislature or Congress. If there is a rational basis for the legislation, some imperfections and inequalities will be tolerated. *Olympic Arms, supra* at 1075, quoting *Dillinger v Schweiker*, 762 F2d 506, 508 (CA 6, 1985). Further, a classification does not fail rational-basis review because it in practice results in some inequality. A statute is not invalid under the Constitution because it might have gone further than it did or because it may not have succeeded in bringing about the intended result. *Olympic Arms, supra* at 1073, quoting *Benjamin v Bailey*, 234 Conn 455; 662 A2d 1226, 1238 (1995), and *Roschen v Ward*, 279 US 337, 339 (1929).

In *Deepdale Memorial Gardens v Administrative Secretary of Cemetery Regulations*, 169 Mich App 705 (1988), the court addressed an Equal Protection challenge to a Michigan statute which prohibited a cemetery owner from owning or managing a funeral

establishment. The court found there was an ample rational basis for the regulation because "competition in the cemetery and funeral businesses was preserved by prohibiting one agency from both owning and operating a cemetery and acting as a mortician." 169 Mich App at 713.

Further, Michigan courts have addressed the issue of whether the effective date of a statutory regulation violates Equal Protection. In *Park v Lansing School Dist*, 62 Mich App 397 (1975), the court addressed a Lansing School District policy adopted in 1969 which required administrators to live within the District or suffer loss of their administrative positions. The policy contained an exception for those who had held administrative positions since July 1, 1962. The policy was adopted in 1969, but the July 1, 1962 date was the date when the policy was first brought up in Board discussions. The court found the grandfather clause did **not** violate Equal Protection:

> "Those hired after July, 1962 knew what was expected of them in terms of residence. The allowance made for a certain few administrators can be explained as coming from a desire to accommodate the interests of those administrators who had established themselves outside the district before the policy of in-district administrators was brought up. . . . [NWS] must show that the rule extends a privilege to 'an arbitrary or unreasonable class', *Alexander v Detroit*, 392 Mich 30, 36; 219 NW2d 41 (1974), and that there is no conceivable set of facts that can justify the distinction made in the rule. *Forman v Oakland Co Treasurer*, 57 Mich App 231; 226 NW2d 67 (1974). This has not been done. We are unwilling to say that the rule's cutoff date is wholly without supporting reason."

The distribution of liquor is highly regulated by the State pursuant to the authority of Mich Const 1963 art 4, § 40, so finding a violation of the rational basis test is even more difficult in this context. See *Florentine v City of Grandville, supra* at 617, noting that the Michigan Constitution of 1963 gives the Legislature the authority to delegate complete con-

trol of the State's alcoholic beverage traffic to the Liquor Control Commission. Indeed, even NWS concedes that the three-tier system created by the Legislature for distribution of alcoholic beverages is "designed to protect orderly markets and promote temperance." Appellants' brief, p 9. As noted in the affidavits submitted to the trial court (*see* Lashbrook Aff. attached as Exhibit A) and the Code itself, the statutory scheme NWS challenges is clearly rationally related to that State interest in maintaining a viable, strong three-tier distribution system for wine which the Legislature long ago concluded was in the best interest of the State and the public.

Contrary to the arguments made in NWS's brief, Section 205(3) is a "grandfather clause" and did, at the same time, place restrictions on existing wine wholesalers who chose to become ADAs.

Prior to the passage of Section 205(3), suppliers had the right to dual any wine wholesaler anywhere in Michigan. That is, at the discretion of suppliers, more than one wine wholesaler in the same geographic territory could be appointed to distribute the same brands of wine.[5] However, after the passage of Section 205(3), wine wholesalers who chose to become ADAs were prohibited from being dualed in any area of the State where they were not already dualed for a particular brand with another wholesaler on or before September 24, 1996. Therefore, wine wholesalers who chose to become ADAs (just like

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[5] As a practical matter, prior to 1996 and currently, many wine suppliers do not, in fact, want to appoint more than one wine wholesaler in a geographic territory, and dual appointment of wine wholesalers is not currently the norm. *See* Lashbrook Aff., ¶ 7. However, ADAs/wholesalers might be able to persuade suppliers to appoint them as duals because of their use of State subsidies, which would disrupt the long-established marketing scheme to the detriment of the State, suppliers, consumers and retailers (especially small retailers).

ADAs who become wholesalers) have restrictions placed on their ability to be appointed on a "dualed" basis.

However, Section 205(3)'s restrictions do not foreclose an ADA/wholesaler from competing with new brands or brands that were not dualed in September of 1996, or from buying an existing wholesaler and distributing its products even on a dualed basis. The Legislature rationally chose as part of the privatization scheme to maintain the "status quo" as it existed just prior to the passage of the privatization act, and allowed wholesalers who were already dualed to be "grandfathered in" with regard to those ***specific geographic territories*** for those ***specific brands***. But all wholesalers who became ADAs lost their right to be dualed with other wine wholesalers in any other part of the State where they were not already distributing a then-existing wine brand as of September of 1996, the date that was inserted into the statute while it was undergoing the legislative process. The Legislature obviously thought this would foster a strong and viable three-tier distribution system.

The Legislature decided to utilize the September 24, 1996 date for the very practical reason that if that date was not contained in the statute, there would have been nothing to stop wholesalers who believed that they were going to be appointed as ADAs from going to suppliers and being dualed prior to the effective date of the statute. *See Park v Lansing School Dist, supra*, which recognized another reason why a date may be inserted into a statute other than the effective date of the statute and not violate Equal Protection.

Thus, contrary to the argument made by NWS, the inclusion of the September 24, 1996 date in the statute worked more of a hardship on then-existing wine wholesalers (who were forced to give up a right they previously had of being appointed on a dualed basis)

who were going to become ADAs and limited their future ability to become "dualed."[6] That is, by choosing the date selected, the Legislature wanted to lock in existing distribution rights and to restrict distribution rights for any existing wholesaler who might try to become an ADA.

NWS is being disingenuous when it broadly (and unconvincingly) claims that it is "effectively" kept out of the wine wholesaler market.[7] To begin with, the prohibitions in Section 205(3) only apply to ***particular*** limited geographic areas and ***particular*** brands that were being distributed on or before September 24, 1996, and that restriction does not apply to any brands of wine that were not being distributed at that point in time. And, the record indicates that new wine brands are continually being offered in Michigan. *See* affidavit of Julie Wendt, attached to defendant-appellee State of Michigan's Brief in Opposition to Motion for Summary Disposition, where she notes that there are 20,000 brands of wine registered in Michigan for resale in the State of Michigan and of the 300 licensed out-state sellers of wine, approximately 143 licenses have been issued since September 24, 1996. This clearly demonstrates that new wine suppliers and wine brands are continually coming into the market. Likewise, nothing would prohibit NWS from purchasing existing wine wholesalers as a way of entering the market and distributing.

The minimal restrictions placed on NWS do not give rise to a valid Equal Protection claim since the State's actions are rationally related to the State's interest in maintaining

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[6] It is difficult to understand how NWS could claim harm from selection of this date since it did not become a wholesaler until 1999.

[7] NWS tries to rely on its self-serving affidavits it filed win the trial court. However, those "affidavits" are simply wrong, and were objected to in the trial court and should be rejected by this Court since they do not comply with MCR 2.116(G)(6) and MCR 2.119.

a strong, viable wine distribution system with a number of wholesalers to ensure competition and service to all retailers (large and small) and the public.[8]

NWS has not met the heavy burden of demonstrating that Section 205(3) violates the Equal Protection clauses of the federal and State constitutions. In fact, Section 205(3) clearly does ***not*** violate Equal Protection and the trial court correctly found that defendants were entitled to summary disposition.

II. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY FOUND THAT SECTION 205(3) DOES NOT VIOLATE THE COMMERCE BECAUSE IT REPRESENTS THE EXERCISE OF MICHIGAN'S AUTHORITY TO STRUCTURE ITS DISTRIBUTION SYSTEM FOR INTOXICATING LIQUORS UNDER THE TWENTY-FIRST AMENDMENT AND BECAUSE EVEN WERE THIS NOT AN EXERCISE OF MICHIGAN'S TWENTY-FIRST AMENDMENT AUTHORITY, THERE IS NO IMPACT ON INTERSTATE COMMERCE SO AS TO GIVE RISE TO A COMMERCE CLAUSE CHALLENGE.

A.

NWS baldly asserts (without any factual support) that the legislation at issue here (Section 205(3)) had as its goal to unfairly discriminate against out-of-state businesses. That argument is ridiculous. As the lower courts found, the challenged legislation is neutral on its face and in practice. It treats all entities alike. And, Section 205(3) actually limited distribution rights for any existing wholesaler who was going to become an ADA.[9] How does that evidence a desire to favor in-state businesses over out-of-state businesses?

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[8] *See* Lashbrook Aff., ¶ 24, where he notes that if there are not a variety of wholesalers, an ADA/wholesaler can "cherry pick" the most lucrative retail outlets (*e.g.*, large retail chains) and ignore the smaller retailers to the detriment of the retailers and consumers.

[9] That is, before Section 205(3), wholesalers had the right to be appointed (with the suppliers permission) as a dual (*i.e.*, two wholesalers can be appointed to distribute the same brand in the same territory). Under Section 205(3), the right to be dualed is severely limited for wholesalers who are also ADAs.

NWS also references MCL 346.110(1), which requires wine wholesalers to have been Michigan residents for one year prior to obtaining a license as a wholesaler, but does not allege that MCL 346.110(1) would have precluded NWS from becoming a wholesaler prior to September 24, 1996, just as it did not preclude NWS from becoming a wholesaler after September 24, 1996. In fact, NWS had the ability to become a wine wholesaler in Michigan prior to September 24, 1996, just as it had a right to become a wine wholesaler after September 24, 1996. But, of course, this suit is ***not*** about the constitutionality of MCL 346.110(1) and the constitutionality of that statute was not at issue before the trial court and is not at issue here. *See Swickard v Wayne County Medical Examiner,* 438 Mich 536 (1991) (issues not presented to trial court are not preserved for appeal); and *Village of St. Clair Shores v Village of Grosse Pointe*, 319 Mich 372 (1947) (an issue not submitted to or passed upon by the trial court cannot be considered on appeal).

The lack of discriminatory intent in Section 205(3) can also be seen in the fact that the legislation creating the new category of spirits distributor known as ADAs does not contain a one-year residence requirement; therefore, NWS was allowed to become an ADA immediately upon passage of the privatization legislation. That evidences a legislative intent to give NWS and any other out-of-state business ***immediate*** access to the Michigan market, rather than wait for one year before being appointed an ADA. This Court (like the trial court and Court of Appeals) should see NWS's unsupported allegations regarding legislative intent for what they are: pure speculation unsupported by anything in the statute or the facts presented to the trial court. There simply is no admissible evidence of an intent to discriminate against out-of-state entities in the record. *See Maiden v Rozwood*, 461 Mich 109 (1999) and MCR 2.116(G)(6).

B.

NWS's brief misconstrues the defendant's Commerce Clause arguments when it states that defendants have "admitted" that the purpose of Section 205(3) was enacted to favor in-state wholesalers over out-of-state entities. If that were the purpose, the statute could have been drafted in such a way as to preclude NWS from being an ADA – but, of course, that was not done and NWS even admits the State turned to it for advice. *See* Appellants' brief at p 9. The only interest sought to be protected in Section 205(3) was the ***State's interest*** in a ***viable*** three-tier distribution system for wine. The State of Michigan (through the Legislature) determined it would promote the ***State's interest*** to have a wholesaler tier that was not dominated by a few ADAs who would utilize state-generated revenues to unfairly compete against non-ADA wine wholesalers which would disadvantage small retailers, consumers and jeopardize the State's existing three-tier distribution system. *See* Lashbrook Affidavit, Exhibit A.

C.

NWS mischaracterizes the Twenty-First Amendment and cases which address that constitutional provision. An objective reading of defendants' Twenty-First Amendment arguments (and the trial court's decision) makes clear that neither the defendants (or the trial court) stated that the Twenty-First Amendment ***always*** trumps the Commerce Clause or repeals the Commerce Clause. In fact the cases cited by defendants in their lower court briefs made clear that there are some circumstances (not present here) where the Commerce Clause would take precedence over the Twenty-First Amendment.

However, the Twenty-First Amendment ***does*** take precedence over the Commerce Clause (and insulates a state from Commerce Clause challenge) where a state exercises

a "core" Twenty-First Amendment power, which includes the right to ***structure the state's distribution system*** for alcoholic beverages as the State sees fit, free of Commerce Clause restraints. NWS has completely ignored that qualification and completely ignores the plain language of the Twenty-First Amendment and the long, unbroken line of Supreme Court authority that holds that the Commerce Clause does not trump the Twenty-First Amendment where a state is exercising a "core power."[10] *See, e.g., Capitol Cities Cable, Inc v Crist*, 467 US 691, 712, 715 (1984) (where the Supreme Court noted that exercising state control over whether to permit "importation or sale of liquor and how to structure the liquor distribution system is the central power reserved by Section 2 of the Twenty-first Amendment" and "The States enjoy broad powers under Section 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders."); *State Bd of Equalization v Young's Market Co*, 299 U.S. 59, 63 (1964) ("Can it be doubted that a state might establish a monopoly of the manufacture and sale of beer, and either prohibit all competing importation, or discourage importations by laying a heavy import, or channelize desired importations by confining them to a single consignee?"[11]); *California Retail Liquor Dealers Ass'n v Mid-Cal Aluminum, Inc*, 445 US 97, 107-108 (1980) ("[E]arly decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquors from other jurisdictions . . .." and "The Twenty-first

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[10] At page 12 of its brief, NWS makes the statement that "it is now beyond dispute that the Commerce Clause restricts any state that attempts to pass liquor laws which impact interstate commerce." That is a clear misreading of the law, and NWS cites no authority for this erroneous proposition, which ignores almost 70 years of "core power" analysis by the U.S. Supreme Court.

[11] In *Young's Market*, the Court upheld a license fee on the importation of beer that would have been unconstitutional under the Commerce Clause, but not the Twenty-first Amendment.

Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); *Hostetter v Idlewild Bon Voyage Liquor Corp*, 377 US 324, 330, 333 (1936) (recognizing a state's right to "regulate or control the transportation of . . . liquor . . . from the time of its entry into the State in order to avoid unlawful diversion into its territory" and "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provision a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."); *Ziffrin, Inc v Reeves*, 308 US 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); *Indianapolis Brewing Co v Liquor Control Comm'n*, 305 US 391, 394 (1939) ("Since the Twenty-first Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause.").[12]

The most recent Supreme Court decision to address the "core power" concept is *North Dakota v United States*, 495 US 423, 431-433 (1990), where the Supreme Court reconfirmed this long recognition of state authority and that within "the area of its jurisdiction, the State has 'virtually complete control' of the importation and sale of liquor and the structure of the liquor distribution system." In upholding a North Dakota statute

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[12] As a review of the case law will indicate, there are factual situations completely different than those at issue here where a state acting outside of its Twenty-first Amendment "core powers" may violate another provision of the constitution. However, even these cases recognize the limitation put on the Commerce Clause when a sate is involved with the importation and delivery of alcohol within its borders. *See, e.g., 44 Liquormart, Inc v Rhode Island*, 517 US 484, 516 (1996) ("[T]he Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders . . ..").

that was challenged as violating the Supremacy Clause, Justice Stevens, for a four-Justice plurality, stated:

> "The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate" *Id.* at 431-432.

Justice Scalia, concurring, stated:

> "The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from licensed in-state wholesalers." 495 U.S. at 447.[13]

Thus, as recognized by *North Dakota* (and other cases), the Twenty-First Amendment controls when a state seeks to regulate importation or transportation of alcoholic beverages, seeks to promote temperance, seeks to ensure orderly market conditions, or seeks to raise tax revenues. And, as noted in *North Dakota* (Opinion of J. Scalia at 447): States can ***require*** that importation of alcoholic beverages ***must*** pass through the state's licensed three-tier system.

The regulatory scheme being challenged here unquestionably deals with a "core power" given to the states by the Twenty-First Amendment (*i.e.*, the right to promote Michigan's interests in temperance, orderly market conditions, and collection of taxes.) The comprehensive statutory scheme at issue here is "unquestionably legitimate" and not subject to the Commerce Clause. *North Dakota, supra*.

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[13] Four Justices dissented in *North Dakota* on a federal immunity issue, but no Justice disputed that a state could require that imports of alcoholic beverages for state residents go through a licensed wholesaler. *See North Dakota, supra,* 495 U.S. at 448-471.

D.

What NWS is actually saying is that NWS (or a court) should have the right to intrude into the State's control and structure of its alcoholic beverage distribution. This is clearly inconsistent with well-established Supreme Court authority. And, NWS has not cited a single Supreme Court case which holds that the Commerce Clause puts restraints upon a state's ability to structure its distribution system as it sees fit. In fact, such a holding would be inconsistent with the long line of Supreme Court authority that begins immediately after the repeal of Prohibition and continues to this date.

In support of its arguments that the U.S. Supreme Court has rejected its "core power" analysis and would find that the Commerce Clause trumps the Twenty-First Amendment where a state wants to structure its alcoholic beverage distribution system, NWS primarily relies upon three cases: *Hostetter, supra*, 373 US 374; *California Retail Liquor Dealers Ass'n, supra*, 445 US 97; and *Bacchus Imports Ltd v Dais*, 468 US 263 (1984). However, those cases are all factually distinguishable and do not overrule the core power analysis most recently addressed in *North Dakota, supra*. None of these cases deal with a state's "core power" to regulate importation or transportation of alcoholic beverages into the state and none deals with a state's right to structure its alcoholic beverage distribution system (a "core power").

Hostetter addressed an entirely different issue, *i.e.*, whether the State of New York had the right to prohibit passage of liquor (under the supervision of the U.S. Bureau of Customs acting under federal law) through New York for delivery to consumers in foreign countries. Although the *Hostetter* Court found a violation of the Commerce Clause under that entirely different factual scenario, *Hostetter* (at 377 US at 330-331) cited with approval

the numerous Supreme Court cases dealing with a state's plenary authority under the Twenty-First Amendment to restrict importation and to regulate the structure of its alcoholic beverage distribution system free of Commerce Clause restraints.

Bacchus Imports, supra involved an Hawaii statute which exempted locally produced pineapple wine from Hawaii's excise tax. Hawaii acknowledged that this was a protectionistic statute aimed at discriminating against out-of-state suppliers. Indeed, it was not until the case got to the Supreme Court that Hawaii even tried to raise the Twenty-First Amendment argument. Certainly, *Bacchus Imports* did not involve a "core power."

The fact situation in *California Retail Liquor Dealers Ass'n v Mid-Cal, supra* also does not resemble the instant case. *California Retail Liquor* dealt with a state's right to allow private entities to establish price schedules which had the effect of setting prices for a particular brand for all wholesalers within a given territory and resulted in illegal retail price maintenance by private entities throughout the state. However, again, *California Retail Liquor* recognized that there are "core power" areas where the Twenty-First Amendment insulates states from the operation of the Commerce Clause. *California Retail Liquor*, 445 US at 110 ("The Twenty-First Amendment grants states virtually complete control . . . [in] how to structure the liquor distribution system.").

E.

NWS's reliance on a Sixth Circuit Court of Appeals decision in *Heald v Engler*, 342 F3d 517 (CA 6, 2003) gets it nowhere. That case was incorrectly decided. In fact, since the filing of NWS's brief, the U.S. Supreme Court (by order dated May 24, 2004) has granted petition to review the Sixth Circuit decision in *Heald*. It is expected that *Heald* will be overruled.

In any case, *Heald* certainly does not overrule the long line of U.S. Supreme Court cases which recognize a state's "core power" to do things free of Commerce Clause restraints. *Heald* is also factually distinguishable from the instant case (it involved a situation where in-state wineries were allowed to directly ship to Michigan residents, but out-of-state wineries were not), and the logic and analysis of *Heald* is, to be blunt, faulty. The analysis set forth in *Heald* is inconsistent with at least two other federal appellate case which addressed a similar fact situation as that involved in *Heald*. One of those cases *Swedenburg v Kelly*, 358 F3d 223 (CA 2, 2004) (petition for certiorari granted May 24, 2004) was decided after *Heald* and specifically rejected *Heald*'s interpretation of the 21st Amendment's relationship to the dormant Commerce Clause. The other federal appeals court decisions to reach the conclusion that the Twenty-First Amendment controls where a state deals with importation of alcoholic beverages and the structure of its wine distribution system is *Bridenbaugh v Freeman-Wilson*, 227 F3d 848 (CA 7, 2000), *cert den* 532 US 1002 (2001). The U.S. Supreme Court denied *certiorari*, thus implicitly accepting the analysis that the Twenty-First Amendment insulates states from Commerce Clause challenges.

F.

Even setting aside the Twenty-First Amendment, and even assuming incorrectly that there is some discriminatory purpose or impact in the application of Section 205(3), there still would not be a Commerce Clause violation. There is no Commerce Clause violation where out-of-state entities have access to the state market even if this is some burden. *See Exxon Corp v Governor of Maryland*, 437 US 117 (1978). *See also Minnesota v*

Cloverleaf Creamery Co, 449 US 456 (1981) (Minnesota law prohibiting sale of milk products in plastic to benefit of Minnesota producers of paper containers).

G.

Federal statutes also reserve to Michigan the right to structure its alcohol distribution system. Even assuming incorrectly that the Commerce Clause applied to the State's exercise of a Twenty-First Amendment core power, then the federal government has acquiesced to the state's exercise of that power by enacting the Webb-Kenyon Act (27 USC § 122) (which divests intoxicating liquors of their interstate character).

As the trial court and the Court of Appeals recognized, there is no commerce clause issue here because there is no discrimination or burden on interstate commerce. Even assuming incorrectly that there was a commerce clause issue the Twenty-First Amendment and Webb-Kenyon Act gives Michigan the right to structure its alcohol distribution system.

CONCLUSION

MB&WWA respectfully requests that this Court deny the application for leave to appeal.

Respectfully submitted,

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